

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

RECEIVED

AUG 23 1993

In re)
)
Review and Revision of Rules) RM-
Governing Radio Station)
Ownership Opportunities)

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

PETITION FOR RULE MAKING

NATIONAL ASSOCIATION OF BROADCASTERS
1771 N Street, NW
Washington, DC 20036

Henry L. Baumann
Executive Vice President and
General Counsel

Barry D. Umansky
Deputy General Counsel

Mark R. Fratrik, PhD
Vice President/Economist

Gerald G. Hartshorn
Director of Audience Measurement
and Policy Research

Michele J. Herschkowitz
NAB Legal Intern

August 23, 1993

No. of Copies rec'd
List A B C D E
mm

0411

TABLE OF CONTENTS

	Page
EXECUTIVE SUMMARY	i
I. INTRODUCTION AND SUMMARY	1
II. RADIO OWNERSHIP RULES STILL FAIL TO PROVIDE MANY BROADCASTERS WITH NEEDED RELIEF	4
III. ECONOMIC AND RATIONAL COMMUNICATION POLICY CONCERNS SUPPORT THE FURTHER REFINEMENT OF THE RADIO OWNERSHIP RULES	8
IV. ADOPTION OR LIMITED CHANGES TO THE LOCAL DUOPOLY RULES WOULD BENEFIT BROADCASTERS, THE PUBLIC AND THE FCC	12
A. Larger Market Rules Governing Smaller Market Broadcasters	13
B. Ownership of 50% of Stations in a Market	15
C. Allowing Any Single Station or AM-FM Combo Owner To Add One Additional Station to Common Ownership	15
D. Establishing a Small Market Waiver System	16
V. CONCLUSION	17

EXECUTIVE SUMMARY

While the revised radio ownership rules provide welcome benefits for most radio broadcasters, there are still some aspects of these rules' application that require FCC attention. Despite the improvements in these rules, there are times where strict interpretation has yielded results opposite those intended by the Commission. As a result, broadcasters in many smaller market situations are precluded from combining operations, and thus are hampered in their efforts to serve the local audience -- the primary intended beneficiary of the new regulations.

In some instances, broadcasters in traditionally "smaller" markets are precluded from combining ownership or doing a time brokerage arrangement with a station in generally the same area, if the proposed station combination's overlapping contours result in a market classification as a "larger" market and thus subject it to the 25 percent audience share cap. While principal community contours generally provide much better "market size" results than previous methods, the contour approach sometimes results in anomalous situations where stations are treated inequitably and their communities are left without access to the benefits of consolidation and cost efficiency.¹

In other cases, broadcasters in truly smaller markets are at times limited to owning only their original, single

¹This kind of situation is the subject of a separate set of comments NAB has filed today in support of a request for declaratory ruling filed by two parties limited by an anomalous operation of the Commission's new rules.

station under the revised rules. Because broadcasters in smaller markets must own fewer than half of the market's stations, a station in a market with four or fewer stations cannot acquire even a failing station in need of rescue. Also, an owner of a preexisting AM-FM combination also cannot acquire another station unless there are at least seven stations in the market.

In order that stations in these circumstances also may benefit from additional ownership opportunities, NAB respectfully petitions the Commission to formulate a set of modest rule and/or policy changes that would aid those still in need of further relief. By taking such action, the Commission would provide the public, broadcasters and the FCC with several benefits. The public would better be served by stations with greater financial wherewithal and greater potential to provide public service, especially where the alternative would be dark or failing stations. Moreover, the Commission itself would be relieved of what otherwise might be an onslaught of waiver requests intended to achieve the same result that can be provided by general rule or policy changes.

Furthermore, by adopting the modest rule changes NAB is proposing today, the interests of increasing program diversity would not be threatened but advanced.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

RECEIVED

AUG 23 1993

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In re)	
)	
Review and Revision of Rules)	RM-
Governing Radio Station)	
Ownership Opportunities)	

PETITION FOR RULE MAKING

I. INTRODUCTION AND SUMMARY

In March of 1992, the Commission modified its rules regarding radio ownership.² These rule changes were adopted in response to comments by the National Association of Broadcasters ("NAB")³ and others calling for FCC rule revisions that would allow stations to enjoy greater cost efficiencies through combined operations, both locally and nationally.

Among the rule changes in the Report and Order was a relaxation of previous duopoly rules; under the March, 1992, action a single entity in a large market could own up to three AM and three FM stations so long as 25 percent of combined audience share was not exceeded. In smaller markets, defined as those with fewer than 15 stations, a single broadcaster could own up to

²See Report and Order ("Report and Order") in MM Docket No. 91-140, 7 FCC Rcd 2755 (1992).

³NAB is a nonprofit, incorporated association of radio and television broadcast stations and networks. NAB serves and represents America's radio and television stations and networks.

three stations if this did not result in ownership of half or more of all local stations.

On May 29, 1992, NAB filed a Petition for Partial Reconsideration, requesting the Commission to modify these new rules.⁴ Other petitions for reconsideration were filed as well.

In response to these filings, the Commission, on September 4, 1992, further refined its radio ownership limits.⁵ In larger markets, this meant that a single entity could own up to two AM and two FM stations if the combined audience share did not exceed 25 percent. Broadcasters in smaller markets could own up to three stations, with a limit of two in the same service, so long as fewer than half the number of "market" stations was held by that single entity.

In this last revision to its rules, the Commission also discarded Arbitron ratings as a means to designate markets and market size, replacing that approach with a system based on overlapping principal community contours. Time brokerage rules were also modified; a party controlling more than fifteen percent of broadcast time in another station will be deemed to "own" that station for purposes of meeting ownership limits.

⁴NAB Petition for Partial Reconsideration and Clarification, filed May 29, 1992.

⁵See Memorandum Opinion and Order and Further Notice of Proposed Rule Making in MM Docket No. 91-140, 7 FCC Rcd 6387 (1992). This reconsideration decision also modified the national radio ownership limits adopted in the Report and Order. NAB does not here seek any further change in the national ownership rules.

While the revised rules provided welcome benefits for most radio broadcasters, there are still some problematic areas that require FCC attention. Despite the improvements in these rules, there are times where strict interpretation has yielded results opposite those intended by the Commission. As a result, broadcasters in many smaller market situations are precluded from combining operations, and thus are hampered in their efforts to serve the local audience -- the primary intended beneficiary of the new regulations.

In some instances, broadcasters in traditionally "smaller" markets are precluded from combining ownership or doing a time brokerage arrangement with a station in generally the same area, if the proposed station combination's overlapping contours result in a market classification as a "larger" market and thus subject it to the 25 percent audience share cap. While principal community contours generally provide much better "market size" results than previous methods, the contour approach sometimes results in anomalous situations where stations are treated inequitably and their communities are left without access to the benefits of consolidation and cost efficiency.⁶

Entities in truly smaller markets are at times limited to owning only their original, single station under the revised rules. Because broadcasters in smaller markets now must own

⁶This kind of situation, addressed further below, is the subject of a separate set of comments (also discussed below) NAB has filed today in support of a request for declaratory ruling filed by two parties limited by an anomalous operation of the Commission's new rules.

fewer than half of the market's stations, a station in a market with four or fewer stations cannot acquire even a failing station in need of rescue. Also, an owner of a preexisting AM-FM combination also cannot acquire another station unless there are at least seven stations in the market.

In order that stations in these circumstances also may benefit from additional ownership opportunities, NAB respectfully petitions the Commission to formulate a set of modest rule and/or policy changes that would aid those still in need of further relief. By taking such action, the Commission would provide the public, broadcasters and the FCC with several benefits. The public would better be served by stations with greater financial wherewithal and greater potential to provide public service, especially where the alternative would be dark or failing stations. Moreover, the Commission itself would be relieved of what otherwise might be an onslaught of waiver requests intended to achieve the same result that can be provided by general rule or policy changes.

II. RADIO OWNERSHIP RULES STILL FAIL TO PROVIDE MANY BROADCASTERS WITH NEEDED RELIEF.

Now with significant experience under the new radio ownership rules, it is clear that broadcasters and radio audiences in smaller markets would gain significant benefits from further modest changes in the radio ownership regulatory scheme. Under the numerical and share caps on local ownership, certain classes of broadcasters are completely constrained from enjoying

consolidation opportunities that would serve to enhance their ability to operate more effectively in their local radio markets.

As noted above, many truly small market operators are totally limited by the new rules. That is, broadcasters in markets with very few stations are often completely incapable of realizing necessary efficiencies by expanding ownership under the rules limiting ownership to less than half of the market. Ownership of a mere two stations would exceed this limit in a market with four or fewer stations. Thus, a broadcaster operating in such a market is precluded from acquiring an additional station, even if the community would ultimately benefit from increased service and if the purchasing and/or purchased station would be unable to operate effectively -- or at all -- absent the combination.

Also, station operators in what are considered small markets for all other purposes often are thrust into a larger market compliance analysis by virtue of the contour method of market classification. These broadcasters are thus not subject to the 50 percent of market stations limit but instead are placed under the often more limiting 25 percent audience share cap on local ownership.

The reconsideration change in the methodology for determining in market size was welcomed by the NAB. However, while the use of principal community contours generally is much preferable than use of Arbitron market designations, the results

of such use can, on some occasions, be far from what the Commission's overall radio ownership policy intended to create.

Many broadcasters traditionally have viewed themselves correctly as small market broadcasters, with their principal community contours overlapping only a few stations. However, the current rules also require a look at the station to be acquired; and the number of stations with contours overlapping that other station can affect an application's acceptability to the Commission. Thus, a broadcaster in a "smaller market" who wishes to purchase another station may find himself or herself classified as a larger market broadcaster by the Commission and thus required to meet the 25 percent of the audience share. Yet, the station is truly only competing in that smaller market.

One example of such anomalies is depicted in the request for declaratory ruling submitted jointly on June 7, 1993, by J B Broadcasting, Inc. ("JB") and Anderson Broadcasting ("Anderson"). JB is permittee of Station KBWK (FM) and Anderson is licensee of Stations KBMR (AM) and KQDY-FM -- all Bismarck, North Dakota. Indeed, the Commission currently has asked for public comment on this declaratory ruling request.⁷ Though based on a proposed time brokerage-type local marketing agreement ("LMA") rather than a proposed transfer of ownership,⁸ the

⁷See FCC Public Notice, "Request for Declaratory Ruling concerning Compliance with 47 C.F.R. §73.3555 As Regards a Local Marketing Agreement," Report No. 15576, released July 22, 1993.

⁸This distinction is largely irrelevant in that, under the Commission's rules and policies, parties wishing to engage in a
(continued...)

JB/Anderson proposal is a useful illustration of the kind of problems that NAB would like the Commission to address and resolve.

In the Bismarck case, the Anderson and JB FM stations have largely concentric principal community contours. However, the Anderson AM station casts a principal community contour not only encompassing the two FM stations but extending far beyond the reach of the FM stations' principal community signals. It is this AM signal which, by operation of the new ownership/LMA rules, places the transaction in question into the "large market" analysis.

Because the AM contour overlaps over 27 stations, rather than just the eight stations that overlap the two FM stations' principal community contours, the proposed LMA deal is subject to the 25% audience share limit. But, again under the operation of the Commission's rules, that analysis, employing metro market data or county data of the parties' stations, puts the proposed combination at an audience share level above the 25% threshold. If the extended reach of the AM station were disregarded, only ten stations would be considered part of the market and, under a "small market" analysis, the three-station Anderson/JB LMA would fall well short of the "50% of stations in the market" cap. The two parties ask the Commission to evaluate

⁸(...continued)
time brokerage-type LMA must be eligible to be under common ownership. That is, the relief requested by NAB in the instant petition for rule making should apply to both combined ownership and stations' choice to enter a time brokerage-type LMA.

the proposed transaction either: (1) under the small market rules where the three-station agreement would be acceptable in a ten-station market; or (2) under the large market rules where the parties can rely upon county-by-county measurement of all the listening attributable to the 27 stations that, under the FCC rules, make up that "large market." Such an assessment would include listening in the counties where the non-transaction "overlapped" stations operate.⁹

In brief comments filed today on the JB/Anderson declaratory ruling request, NAB has urged the Commission to grant the request. We believe that this kind of situation deserves FCC relief. Moreover, instead of requiring parties to go to the Commission each time for such relief, we believe the Commission should adopt rule changes that generally would allow parties in this and related situations to benefit from new cost efficiencies and economies of scale, regardless of whether the relief is sought in the context of an ownership transfer or a time brokerage agreement.

III. ECONOMIC AND RATIONAL COMMUNICATION POLICY CONCERNS SUPPORT THE FURTHER REFINEMENT OF THE RADIO OWNERSHIP RULES.

Limits on ownership aim at a desired result: preventing concentration in the industry. However, setting such limits must be viewed in light of the fact that "radio" accounts for only a

⁹In the Bismarck example, such an assessment would yield an audience share of 13.8% among the transaction partners.

limited percentage of the mass media advertising marketplace. Even if ownership of all stations in a given market were combined, a single entity would hardly dominate the advertising market.

Radio is just one player among many in the local advertising marketplace. Traditionally, local newspapers have dominated that marketplace, with local television stations also increasing their market position in recent years. Moreover, local cable systems as well as weekly "shoppers" newspapers have made inroads in just the past few years. As the Commission has noted, the radio industry only accounts for 12% of the total local advertising marketplace.¹⁰

What that small share of the marketplace suggests is that there is simply very little to worry about in the advertising marketplace with a modest additional consolidation of radio stations. In fact, the local advertising marketplace may become even more competitive if certain local radio stations realize efficiencies from consolidation and become stronger competitors.

Since the advent of broadcast radio, the communications marketplace has been transformed by the maturation of television as well as the explosive growth of cable and satellite services. In 1987, NAB performed a comprehensive study of media outlets

¹⁰See Report and Order, supra note 1, ¶8.

available to the public.¹¹ The survey revealed an amazing avalanche of access to diverse media outlets. For example, the average market had access to 36 cable channels, 10 over-the-air television signals, 20.4 AM and 19.5 FM radio signals, 15.9 newspapers, 11.8 magazines with subscription figures of at least five percent, and a VCR penetration rate of 48.7%.¹² Today cable penetration has grown to 64.5% nationwide, ranging from 48% to 91% in individual markets.¹³ VCR penetration now has risen to 81.7% of households.¹⁴ Since that survey, the number of other alternative information sources has continued to grow, furnishing unsurpassed diversity of programming. In addition, the existence and growth of rival media further guarantee competitive local radio advertising markets.

Given these developments and facts, it is not surprising that studies have revealed a noticeable absence of economic concentration in the radio industry. The Herfindahl-Hirschman Index (HHI), used by the Justice Department to assess concentration levels in other industries, reveals substantial dispersion when used to evaluate audience shares for radio

¹¹See Vestal, P., "An Analysis of Media Outlets by Markets," submitted as Appendix B to NAB's Comments in MM Docket No. 87-7, filed June 15, 1987.

¹²Id. at 1.

¹³See May 1993 Cable & Other TVHH Universe Estimates Update, The Arbitron Company, released July, 1993.

¹⁴See May 1993 VCR Penetration Estimates, The Arbitron Company, released June, 1993.

stations.¹⁵ With alternative media continuing to expand, the possibility of dramatic increases in radio's economic concentration is remote. Furthermore, current antitrust regulation provides ample protection against unacceptable growth.

Moreover, were the Commission to adopt the modest rule and policy changes we are advancing today, the interests of program diversity would not be threatened but advanced. It is more than clear that stations with a greater financial wherewithal have a much greater potential for the provision of locally-responsive public service than stations that are struggling. That is, were additional stations, especially those that are facing tough financial problems or which have even temporarily left the air, able to enjoy the benefits of joint operation and cost efficiencies, the local audiences involved would find the levels of local program diversity to be augmented rather than diminished.

Thus, while market concentration is generally best avoided, the Commission's role in this regard is generally unnecessary in radio. The evils that antitrust regulation are intended to prevent simply do not exist here. Therefore, FCC limits designed for this purpose may hurt rather than help broadcasters and the public they serve. In light of these factors, a modest set of local radio ownership rule changes would

¹⁵ See Fratrik, M., "An Updated Examination of Market Concentration in Radio Markets," submitted as Appendix E to NAB's Comments in MM Docket 87-7, filed June 15, 1987.

logical next step, especially in light of certain perceived inadequacies of the new rules.

IV. ADOPTION OR LIMITED CHANGES TO THE LOCAL DUOPOLY RULES WOULD BENEFIT BROADCASTERS, THE PUBLIC AND THE FCC.

The current local duopoly rules are, in fact, much more flexible and beneficial than those which preceded the Report and Order. These rules largely meet the needs of most segments of the industry and their listening publics. However, for the difficult situations outlined above, NAB requests limited further change in the rules. Such greater flexibility, through relaxation of some local ownership limits, would free those unduly restrained in the radio marketplace.

Further, modest relaxation of the radio rules would promote greater efficiency in the radio industry. When stations are dark or failing, regardless of where the station is located, the public suffers as a whole. And even if stations are not threatened with demise or heavy losses, the gains that could result from station combination would enure to the benefit of the local audience.

By adopting our recommended changes, the Commission also will be in a position to greatly reduce its administrative burden. Stations will be able to operate under a regulatory regime of greater flexibility and certainty, and thus the need for "waiver" relief from the Commission will arise much less frequently. This will allow the Commission to focus on other important regulatory matters.

Below are several proposed approaches to the provision of needed relief. They generally would result in revised "go-no go" assessment of applications, thus providing certainty for stations and a reduced administrative burden for the Commission's staff. But, should the Commission not adopt appropriate rule changes addressed below, we urge adoption of at least a clear and more liberal waiver policy. Under such a waiver policy, relief could be offered where needed. Yet, the drawbacks of uncertainty, increased broadcaster burden and FCC administrative costs make this alternative far less attractive than clear cut changes to the Commission's rules on local ownership and local time brokerage agreements.

Below are our recommendations:

A. Larger Market Rules Governing Smaller Market Broadcasters

To deal with the kind of situation presented in the J B/Anderson filing discussed above, NAB urges the Commission to adopt a rule change that generally will ensure that stations proposing new common ownership or a time brokerage-type LMA will not be evaluated under a "mix" of the small market and large market rules. As argued in the JB/Anderson request, we believe that the Commission can develop an appropriate rule change that will avoid the situation where certain, ostensibly small market, operators proposing a new ownership combination or time brokerage deal are placed in a "large" market by virtue of contour overlap

yet are subject to an audience share analysis which fails to assess the entirety of these "other stations'" listening.

For purposes of such a rule change, we urge the Commission to look at circumstances where the parties to the ownership or time brokerage arrangement have contours which substantially overlap each other, including situations where one contour completely surrounds that of one or more transaction partner. For these situations, we believe that where the contour of only one station of the transaction partners would place the station in a "large market," the parties to the combination should be evaluated in either of two ways -- and at the discretion of the transaction partners: (1) as a "small market" combination (subject to a numerical "station count" limit but not an audience share assessment), looking at the number of stations which overlap only the smaller facility; or (2) as a "large market" combination but having the market share analysis focussing not on metro market data or on county-by-county data for counties where only the transaction partners operate, but also on the entirety of "county-by-county" listening among the mass of "overlapped" stations that place the transaction partners in the "large market" category. In this fashion the FCC will allow a greater degree of rationality to govern several of the anomalous situations which have become apparent over the past several months' experience under the new rules.

B. Ownership of 50% of Stations in a Market

Employing a universal "not greater than 50 percent" rule -- in lieu of a "less than 50 percent" standard -- would obviate the problems faced by many small market broadcasters and generally allow the rescue of failing or dark stations by a successful broadcaster in a genuinely small market.

In this fashion, an important segment of the radio industry would be able, for the first time, to take advantage of cost efficiencies and consolidation afforded through duopoly and local time brokerage arrangements. For reasons stated above and in NAB's previous filings in MM Docket No. 91-140, the benefits to the local audience from such consolidation would far outweigh any perceived detriments, if indeed there are any.

C. Allowing Any Single Station or AM-FM Combo Owner To Add One Additional Station to Common Ownership.

Allowing broadcasters currently completely limited by the new rules simply to add one additional station also would be consistent with rational communications policy. Those already qualified to acquire another station will not be affected, while those presently barred from doing so will benefit from this expanded opportunity, as will their local audiences.

Adding one additional station to an AM-FM combo owner or to a single station owner would do little to change the overall media concentration level in a market. Thus, acquisition of another station will not raise the concerns the Commission seeks to avoid. As outlined above, the relatively limited role

of radio among the mix of other available media indicates that allowing such radio broadcasters to acquire one additional station will not endanger competition in the mass media advertising marketplace. Indeed, such acquisitions likely will only enhance the overall competitive situation.

D. Establishing a Small Market Waiver System

In the event the FCC does not amend its rules in all or some of the ways recommended above, the Commission is likely to be swamped with numerous requests for waiver.¹⁶ Thus, if the FCC decides to deal with these anomalous cases in such a fashion, a well-defined system of waiver criteria, outlining standardized procedures, would greatly expedite each case.

If broadcasters are given an unambiguous set of guidelines to follow when applying for a waiver, much time and energy would be saved by all. Those applying for waivers would know, up front, what data and other information they need to provide to indicate why the ownership transfer or other transaction would serve the public interest.

One critical element of any waiver policy would be the effort to save a dark or failing station. No one is benefitted by a failed station. As such, there is little reason not to

¹⁶The Commission must, of course, entertain such waiver requests. See, e.g., WAIT Radio v. FCC, 418 F.2d 1153 (D.C. Cir. 1969); see also, Section 1.3 of the Commission's Rules, 47 C.F.R. §1.3 (1992).

waive ownership rules where a dark or failed station is concerned.¹⁷

V. CONCLUSION

NAB applauds the Commission for the benefits provided radio broadcasters and their audiences through the new rules. However, based upon practical experience under these rules, we urge the Commission to adopt some modest, additional changes to the local duopoly regulatory scheme.

Thus, NAB respectfully requests the Commission to consider adoption of new rules, recommended above, that would provide needed relief and ease the uncertainty caused by those rules now in place. Such changes would allow the broadcasting

¹⁷NAB notes that, in recent years, the Commission has granted several requests for waiver of the duopoly or one-to-a-market rules where it was shown that one of the stations party to the transaction was either dark or in severe financial jeopardy.

industry to operate more efficiently and, ultimately, provide enhanced local service for the listening public.

Respectively submitted,

NATIONAL ASSOCIATION OF BROADCASTERS
1771 N Street, NW
Washington, DC 20036



Henry J. Baumann
Executive Vice President and
General Counsel



Barry D. Umansky
Deputy General Counsel

Mark R. Fratrik, PhD
Vice President/Economist

Gerald G. Hartshorn
Director of Audience Measurement
and Policy Research

Michele J. Herschkowitz
NAB Legal Intern

August 23, 1993

CERTIFICATE OF SERVICE

I, Judith L. Gerber, do hereby certify that a true and correct copy of the foregoing "Petition for Rule Making" of the National Association of Broadcasters was hand delivered on this date, August 23, 1993, to the following:

Roy J. Stewart, Chief
Mass Media Bureau
Federal Communications Commission
1919 M Street, NW
Room 314
Washington, DC 20554

Robert H. Ratcliffe, Esq.
Assistant Chief (Law)
Mass Media Bureau
Federal Communications Commission
1919 M Street, NW
Room 314
Washington, DC 20554

Karl Kensinger, Special Assistant
Mass Media Bureau
Federal Communications Commission
1919 M Street, NW
Room 314
Washington, DC 20554

Larry D. Eads, Chief
Audio Services Division
Mass Media Bureau
Federal Communications Commission
1919 M Street, NW
Room 302
Washington, DC 20554



Judith L. Gerber